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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78691247
Applicant	Shrinivas Sugandhalaya
Applied for Mark	NAG CHAMPA
Correspondence Address	PATCHEN M HAGGERTY PERKINS COIE LLP 1201 THIRD AVENUE, SUITE 4900 SEATTLE, WA 98101-3099 UNITED STATES pctrademarks@perkinscoie.com, phaggerty@perkinscoie.com
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Filer's Name	James L. Vana, Attorney of Record
Filer's e-mail	jvana@perkinscoie.com,pctrademarks@perkinscoie.com
Signature	/James L. Vana/
Date	04/11/2016

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re	Shrinivas Sugandhalaya
Serial No.:	78691247
Filed:	August 12, 2005
Mark:	NAG CHAMPA

APPLICANT'S REQUEST FOR RECONSIDERATION

On February 9, 2016, the Trademark Trial and Appeal Board (the “TTAB” or “Board”) issued an opinion affirming the examiner’s refusal to register Applicant’s mark NAG CHAMPA (the “Mark”) for use with incense sticks (the “Goods”). The bases for the refusal are (1) that “nag champa” is merely descriptive of the Goods, and (2) that Applicant has not established that the Mark has acquired distinctiveness. Applicant respectfully believes that the examiner and the Board have inappropriately weighted the evidence proffered by the examiner in support of the refusals and discounted the evidence of acquired distinctiveness provided by Applicant, and therefore requests, pursuant to 37 C.F.R. § 2.144, that the Board reconsider its decision affirming the refusal to register the Mark.

APPLICABLE LEGAL STANDARDS

The legal test for descriptiveness has been set forth the exchanges between Applicant and the examining attorney, and in the TTAB’s February 9, 2016 opinion. The examiner bears the burden of demonstrating that a mark is merely descriptive. See In re Pennzoil Products Co., 20 U.S.P.Q.2d 1753, 1758 (T.T.A.B. 1991). The purpose of a request for reconsideration is to argue that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. See 37 CFR § 2.129(c).

SUMMARY OF EXAMINER'S EVIDENCE

The examiner submitted evidence in support of his position, consisting of the following submissions:

- Excerpts from collaborative Internet sites allegedly offering definitions of “nag champa”.
- Excerpts from other Internet site allegedly showing descriptive use of the wording "nag champa."
- A list of results from an Internet search engine allegedly showing descriptive use of the wording "nag champa."
- A list of two third party registrations featuring “NAG CHAMPA”). (Applicant notes that one of those registrations is no longer valid.)

ARGUMENT

Evidence of the public’s understanding of a term can be obtained from any competent source, including dictionary definitions, research databases, newspapers, and other publications. *See* TMEP 1209.01(c)(i). As noted above, the majority of the evidence introduced by the examiner consisted of articles retrieved from the Internet. As noted in Applicant’s brief, a significant number of the articles introduced by the examiner are of limited probative value, because they do not reveal the source of the articles. See, e.g., In re Total Quality Grp. Inc., 51 U.S.P.Q.2d 1474, 1475-76 (T.T.A.B. 1999) (“Articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. However, the weight given to this evidence must be carefully evaluated, because the source may be unknown.”).

For example, many of the articles are taken from collaborative sources such as Wikipedia, about which the Board has raised concerns: “As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be

corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia's sources." In re IP Carrier Consulting Grp., 84 U.S.P.Q.2d 1028, 1032-33 (T.T.A.B. 2007)).

The examiner's Google search results, submitted with his June 10, 2013 and March 3, 2014 Office Actions, are similarly limited in value. As the Board has previously held, "[a] list of Internet search results generally has little probative value, because such a list does not show the context in which the term is used on the listed web pages. TMEP §710.01(b) (citing In re BayerAG, 488 F.3d 960, 967, 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007) (deeming Google® search results that provided very little context of the use of ASPIRINA to be "of little value in assessing the consumer public perception of the ASPIRINA mark").

In its February 9 opinion, the Board acknowledged Applicant's arguments regarding these evidentiary limitations, but noted without discussion that it had found the evidence in its entirety to be sufficient to establish that the Mark is merely descriptive. Rather than articulate the impact of that evidence on its decision, the Board simply stated that "we find these sites are 'merely illuminative of shade and tone in the total picture confronting the decision maker.'" (citing Interstate Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978)).

In short, the examiner failed to support its secondary source evidence with significant direct evidence. As a result, according to the Board's own precedent (see In re IP Carrier Consulting Grp., 84 U.S.P.Q.2d at 1032-33, and In re Total Quality Grp. Inc., 51 U.S.P.Q.2d at 1475-76 supra), that evidence should be insufficient to establish the mere descriptiveness of the Mark.

CONCLUSION

Applicant submits that the Board erred in not clearly discounting the evidentiary value of the examiner's evidence, and as a result reached incorrect conclusions regard the inherent and acquired distinctiveness of the Mark. As the Federal Circuit Court of Appeals noted in a recent

case involving geographic descriptiveness, “[t]he fact that potential purchasers have enormous amounts of information instantly available through the internet does not evidence the extent to which consumers of certain goods or services in the United States might use this information to discern the primary significance of any particular term.” In re the Newbridge Cultery Company, 776 F.3d 854, 113 U.S.P.Q.2d 1445 (Fed. Cir. 2015).¹ The Court further noted that “it is simply untenable that any information available on the internet should be considered known to the relevant public.” Id. Applicant believes that, if the examiner’s evidence had been properly discounted, Applicant’s Mark would be found to be inherently distinctive, and would in the alternative have been found to have acquired distinctiveness. Applicant respectfully requests that the Board reconsider its February 9, 2016 decision.

DATED: April 11, 2016

PERKINS COIE LLP

By: James L. Vana/

James L. Vana

jvana@perkinscoie.com

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.3036

Facsimile: 206.359.4036

Attorneys for Applicant

80171-4000/128199522.1

¹ While that case considered the issue of geographic descriptiveness, the court’s statements regarding evidentiary value are no less relevant in considering descriptiveness under Section 2(e)(1) of the Lanham Act.